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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

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9 CHARLES KEOHOKALOLE,
10 Petitioner,
11 vs.
12 WARDEN WILLIAMS, et al.,
13 Respondents.

Case No. 2:10-cv-00859-KJD-VCF

ORDER

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15 Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254
16 (#8), respondents' answer (#25), and petitioner's reply (#28). The court finds that petitioner is not
17 entitled to relief, and the court dismisses the action.

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19 In state court, petitioner agreed to plead guilty to failure to stop on the signal of a police
20 officer and grand larceny of an automobile; petitioner also agreed to be treated as a habitual
21 criminal. Ex. 8 (#14). The parties retained the right to argue at sentencing, including treatment
22 pursuant to the large or small habitual criminal provisions, the length of the sentence, and
23 concurrent or consecutive time.¹ *Id.* The state court adjudicated petitioner a habitual criminal
24 pursuant to the small habitual provision, Nev. Rev. Stat. § 207.010(1)(a), and sentenced him

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¹The small habitual criminal provision, Nev. Rev. Stat. § 207.010(1)(a), may apply when a person has been convicted of a felony and has been convicted of felonies two times previously. The large habitual criminal provision, Nev. Rev. Stat. § 207.010(1)(b), may apply when a person has been convicted of a felony and has been convicted of felonies three times previously. The potential sentences for a large habitual criminal adjudication are more severe than the potential sentences for a small habitual criminal adjudication.

1 concurrent prison sentences with maximum terms of twenty years and minimum terms of eight
 2 years. Ex. 13 (#14). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 16 (#14).

3 Petitioner then filed in state court a motion to modify and/or correct an illegal sentence. Ex.
 4 19 (#14). The state court denied that motion. Ex. 21 (#14). Petitioner also filed in state court a
 5 post-conviction habeas corpus petition. Ex. 26 (#14). The state court denied that petition. Ex. 28
 6 (#14). Petitioner appealed the denial of the motion and the denial of the petition. The Nevada
 7 Supreme Court affirmed both denials in a consolidated order. Ex. 29 (#14).

8 Petitioner then commenced this action. This court dismissed grounds 1, 2, 4, 5, 6, and 8 of
 9 the petition as procedurally defaulted because the corresponding grounds in the state habeas corpus
 10 petition were barred by Nev. Rev. Stat. § 34.810. Order (#23). Grounds 3 and 7 remain.

11 Congress has limited the circumstances in which a federal court can grant relief to a
 12 petitioner who is in custody pursuant to a judgment of conviction of a state court.

13 An application for a writ of habeas corpus on behalf of a person in custody pursuant to the
 14 judgment of a State court shall not be granted with respect to any claim that was adjudicated
 on the merits in State court proceedings unless the adjudication of the claim—

15 (1) resulted in a decision that was contrary to, or involved an unreasonable application of,
 16 clearly established Federal law, as determined by the Supreme Court of the United States; or

17 (2) resulted in a decision that was based on an unreasonable determination of the facts in
 18 light of the evidence presented in the State court proceeding.

19 28 U.S.C. § 2254(d). “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the
 20 merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” Harrington v.
Richter, 131 S. Ct. 770, 784 (2011).

21 Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown
 22 that the earlier state court’s decision “was contrary to” federal law then clearly established in
 23 the holdings of this Court, § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); or
 24 that it “involved an unreasonable application of” such law, § 2254(d)(1); or that it “was
 based on an unreasonable determination of the facts” in light of the record before the state
 court, § 2254(d)(2).

25 Richter, 131 S. Ct. at 785. “For purposes of § 2254(d)(1), ‘an unreasonable application of federal
 26 law is different from an incorrect application of federal law.’” Id. (citation omitted). “A state
 27 court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded
 28 jurists could disagree’ on the correctness of the state court’s decision.” Id. (citation omitted).

1 [E]valuating whether a rule application was unreasonable requires considering the rule's
2 specificity. The more general the rule, the more leeway courts have in reaching outcomes in
3 case-by-case determinations.

4 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

5 Under § 2254(d), a habeas court must determine what arguments or theories supported or, as
6 here, could have supported, the state court's decision; and then it must ask whether it is
7 possible fairminded jurists could disagree that those arguments or theories are inconsistent
8 with the holding in a prior decision of this Court.

9 Richter, 131 S. Ct. at 786.

10 As a condition for obtaining habeas corpus from a federal court, a state prisoner must show
11 that the state court's ruling on the claim being presented in federal court was so lacking in
12 justification that there was an error well understood and comprehended in existing law
13 beyond any possibility for fairminded disagreement.

14 Id., at 786-87.

15 Both grounds are claims of ineffective assistance of counsel. “[T]he right to counsel is the
16 right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771 & n.14
17 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the
18 defense attorney's representation “fell below an objective standard of reasonableness,” Strickland v.
19 Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced
20 the defendant such that “there is a reasonable probability that, but for counsel's unprofessional
21 errors, the result of the proceeding would have been different,” id. at 694. “[T]here is no reason for
22 a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to
23 address both components of the inquiry if the defendant makes an insufficient showing on one.” Id.
24 at 697.

25 Strickland expressly declines to articulate specific guidelines for attorney performance
26 beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the
27 duty to advocate the defendant's cause, and the duty to communicate with the client over the course
28 of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel's duties so
exhaustively as to give rise to a “checklist for judicial evaluation of attorney performance. . . . Any
such set of rules would interfere with the constitutionally protected independence of counsel and
restrict the wide latitude counsel must have in making tactical decisions.” Id. at 688-89.

1 Review of an attorney's performance must be "highly deferential," and must adopt counsel's
 2 perspective at the time of the challenged conduct to avoid the "distorting effects of hindsight."
 3 Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that counsel's
 4 conduct falls within the wide range of reasonable professional assistance; that is, the defendant must
 5 overcome the presumption that, under the circumstances, the challenged action 'might be considered
 6 sound trial strategy.'" Id. (citation omitted).

7 The Sixth Amendment does not guarantee effective counsel per se, but rather a fair
 8 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.
 9 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell
 10 below an objective standard of reasonableness alone is insufficient to warrant a finding of
 11 ineffective assistance. The petitioner must also show that the attorney's sub-par performance
 12 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that,
 13 but for the attorney's challenged conduct, the result of the proceeding in question would have been
 14 different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence
 15 in the outcome." Id.

16 Establishing that a state court's application of Strickland was unreasonable under § 2254(d)
 17 is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly
 18 deferential," . . . and when the two apply in tandem, review is "doubly" so The
 19 Strickland standard is a general one, so the range of reasonable applications is substantial.
 20 Federal habeas courts must guard against the danger of equating unreasonableness under
 21 Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is
 22 not whether counsel's actions were reasonable. The question is whether there is any
 23 reasonable argument that counsel satisfied Strickland's deferential standard.

24 Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citations omitted).

25 The court turns first to ground 7, which is a claim that trial counsel provided ineffective
 26 assistance. Because petitioner pleaded guilty, to establish the element of prejudice in the
 27 ineffective-assistance claim, he "must show that there is a reasonable probability that, but for
 28 counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill
v. Lockhart, 474 U.S. 52, 59 (1985). As respondents note, the Nevada Supreme Court identified the
 correct governing principles of federal law. See Ex. 29, at 2 (#14).

1 Petitioner's first claim is that counsel's case load was too heavy to provide ineffective
 2 assistance. On this issue, the Nevada Supreme Court held:

3 Appellant claimed that his trial counsel's case load was too heavy to provide effective
 4 assistance and that trial counsel was unprepared and sought multiple delays as a result.
 5 Appellant failed to describe what actions trial counsel should have taken during the
 6 representation, and thus, he failed to demonstrate that there was a reasonable probability that
 7 he would not have pleaded guilty and would have insisted on going to trial. Trial counsel
 announced he was ready at calendar call before trial was to begin. Appellant received a
 benefit by pleading guilty in that he avoided an additional charge of battery with a deadly
 weapon causing substantial bodily harm. Therefore, the district court did not err in denying
 this claim.

8 Ex. 29, at 3 (#14). A claim of ineffective assistance of counsel places the burden on petitioner to
 9 demonstrate both deficient performance and prejudice. In this instance, petitioner demonstrated
 10 neither. Ground 7 of the federal petition (#8) is a photocopy of the same ground in the state
 11 petition, and nowhere does petitioner allege how he suffered from his counsel's heavy case load.
 12 The Nevada Supreme Court's determination was a reasonable application of Strickland.

13 On petitioner's second claim in ground 7, the Nevada Supreme Court held:

14 Second, appellant claimed that his trial counsel was ineffective because he was unable to
 15 answer questions about discovery and failed to provide advice regarding a possible defense
 16 to the charges. Appellant failed to demonstrate that his trial counsel's performance was
 17 deficient or that he was prejudiced. Appellant failed to set forth what questions his counsel
 18 was unable to answer about discovery and how this impacted his decision to enter a guilty
 plea. During the sentencing hearing, trial counsel mentioned having reviewed the discovery.
 In pleading guilty, appellant acknowledged that trial counsel had discussed possible
 defenses. Further, as stated above, appellant received a benefit by entry of his guilty plea.
 Therefore, the district court did not err in denying this claim.

19 Ex. 29, at 3 (#14). As with the first claim in ground 7, petitioner did not allege any facts showing
 20 deficient performance or prejudice, and thus the Nevada Supreme Court reasonably applied
 21 Strickland.

22 On petitioner's third claim in ground 7, the Nevada Supreme Court held:

23 Third, appellant claimed that his trial counsel was ineffective for conceding he should be
 24 treated as a habitual criminal during the sentencing hearing. Appellant failed to demonstrate
 25 that his trial counsel's performance was deficient or that he was prejudiced. In entering his
 26 guilty plea, appellant stipulated to habitual criminal treatment, but the parties retained the
 27 right to argue about whether he should be adjudicated as large or small habitual criminal, the
 28 length of the sentence, and whether the sentence should be concurrent or consecutive. There
 is simply no support in the record for appellant's assertion that trial counsel's argument was
 without consent given the terms of the plea negotiations. Further, the State noticed and
 presented proof of 4 prior felony convictions. Although the State argued for large habitual
 criminal treatment, the district court imposed small habitual criminal treatment and imposed
 concurrent terms. Appellant failed to demonstrate a reasonable probability of a different

outcome at sentencing had trial counsel made any different argument. Therefore, the district court did not err in denying this claim.

Ex. 29, at 3-4 (#14). The first page of the guilty plea agreement confirms the Nevada Supreme Court's holding. See Ex. 8, at 1 (#14). Counsel argued that petitioner should be treated as a small habitual criminal because petitioner agreed to be treated as a habitual criminal, with the argument over what provision of habitual criminality would apply. The Nevada Supreme Court applied Strickland reasonably.

Ground 3 contains seven claims that petitioner’s counsel on direct appeal provided ineffective assistance because counsel did not raise certain claims. Those claims correspond roughly to the grounds that the court has dismissed as procedurally defaulted, plus some of the underlying issues in ground 7. On the first claim, the Nevada Supreme Court held:

First, appellant claimed that his appellate counsel was ineffective in failing to argue that the State failed to properly file notice of habitual criminality. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. The State filed an amended information prior to entry of the plea, which included notice of habitual criminality and set forth 4 prior felony convictions. NRS 173.095; NRS 207.016(2). Therefore, the district court did not err in denying this claim.

Ex. 29, at 5 (#14). The amended information, filed on November 8, 2007, does contain a notice that the prosecution would seek adjudication of petitioner as a habitual criminal, and it listed the prior convictions that the prosecution would use to prove habitual criminality. Ex. 7 (#14). The Nevada Supreme Court reasonably applied Strickland on this issue.

On the second claim, the Nevada Supreme Court held:

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that only one count could be treated under NRS 207.010. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. NRS 207.010 permits each count to be treated under its provisions. Therefore, the district court did not err in denying this claim.

Ex. 29, at 5 (#14). Nevada law allows for an enhanced habitual-criminal sentence for each primary offense. Odoms v. State, 714 P.2d 568, 572 (Nev. 1986). Counsel would have failed if he had raised this issue on direct appeal. The Nevada Supreme Court reasonably applied Strickland on this issue.

On the third claim, the Nevada Supreme Court held:

1 Third, appellant claimed that his appellate counsel was ineffective for failing to argue that he
 2 could not stipulate to habitual criminal treatment. Appellant failed to demonstrate that
 3 appellate counsel was deficient or that he was prejudiced. There was no error relating to the
 4 small habitual criminal adjudication as appellant stipulated in the plea agreement to being
 5 sentenced as a habitual criminal, the State amended the information to include notice of its
 6 intent to seek habitual criminal adjudication and set forth 4 prior felony convictions, the
 7 presentence report described at least two prior felony convictions, the prior felony
 8 convictions were presented to the district court and filed as part of the record, and appellant
 9 never challenged the existence or constitutional validity of the prior convictions at the
 10 sentencing hearing. Hodges v. State, 119 Nev. 479, 484-85, 78 P.3d 67, 70 (2003).
 11 Therefore, the district court did not err in denying this claim.

12 Ex. 29, at 5-6 (#14).² Hodges, cited in the Nevada Supreme Court's ruling, overruled the two cases
 13 on which petitioner relies for his argument that he could not stipulate to habitual criminal status or
 14 to prior felony convictions. Hodges does allow a defendant to stipulate to the existence and validity
 15 of prior felony convictions. The amended information and the guilty plea agreement show that this
 16 is what petitioner did. See Ex. 7, 8 (#14). Counsel would have failed if he had raised this argument
 17 on appeal. The Nevada Supreme Court applied Strickland reasonably.

18 On the fourth claim, the Nevada Supreme Court held:

19 Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that it
 20 was an abuse of discretion to adjudicate him a habitual criminal because the prior
 21 convictions involved stale and non-violent property crimes. Appellant failed to demonstrate
 22 that appellate counsel was deficient or that he was prejudiced. NRS 207.010 makes no
 23 specific allowance for stale or trivial prior felony convictions. See Tillema v. State, 112
 24 Nev. 266, 271, 914 P.2d 605, 608 (1996). Therefore, the district court did not err in denying
 25 this claim.

26 Ex. 29, at 6 (#14). Given that there is no limitation on the use of stale or trivial felony convictions,
 27 counsel would have failed with this issue if he had raised it on direct appeal. The Nevada Supreme
 28 Court reasonably applied Strickland.

29 On the fifth claim, the Nevada Supreme Court held:

30 Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the
 31 district court did not make a decision it was just and proper to adjudicate him a habitual
 32 criminal. Appellant failed to demonstrate that appellate counsel was deficient or that he was
 33 prejudiced. The district court considered the arguments of the parties and the prior
 34 convictions were presented for the court's review. Appellant had a sufficient number of
 35 convictions to support a habitual criminal adjudication.

36 ²Although the Nevada Supreme Court stated that the prosecution amended the information to
 37 include notice of intent to seek habitual-criminal adjudication and to set forth 4 prior felony
 38 convictions, the original information also contained the notice of intent and the list of prior felony
 39 convictions. See Ex. 3 (#14).

1 qualifying prior felony convictions for small habitual criminal treatment. NRS
2 207.010(1)(a). Therefore, the district court did not err in denying this claim.
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4 Ex. 29, at 6 (#14). The Nevada Supreme Court has held that § 207.010 does not require a
5 sentencing court to determine that it is just and proper to adjudicate a person a habitual criminal.
6 Hughes v. State, 996 P.2d 890, 893-94 (Nev. 2000). Counsel would not have succeeded with this
7 issue if he had raised it on direct appeal. The Nevada Supreme Court reasonably applied Strickland
on this issue.

8 On the sixth claim, the Nevada Supreme Court held:

9 Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that
10 the district court erred in denying him a motion to continue for him to consider the plea
11 negotiations. Appellant failed to demonstrate that appellate counsel was deficient or that he
12 was prejudiced. The district court allowed appellant time to consult with his counsel off the
record when the subject of plea negotiations came up at calendar call the day before trial, but
the district court did not abuse its discretion in declining to grant more time. Therefore, the
district court did not err in denying this claim.

13 Ex. 29, at 6-7 (#14). This was one of the claims that the Nevada Supreme Court incorporated from
14 ground 7, the claim of ineffective assistance of trial counsel. The transcript of the calendar call
15 shows multiple breaks in the proceedings to allow petitioner and his counsel to consult about the
16 plea negotiations. Ex. 9, at 4-6 (#14). Petitioner did not allege any facts showing how further time
17 to consult would have led to a different result. The Nevada Supreme Court reasonably applied
18 Strickland on this issue.

19 On the seventh claim, the Nevada Supreme Court held:

20 Next, appellant claimed that his counsel was ineffective for failing to file his notice of direct
21 appeal and a case appeal statement. Regardless of who filed the notice of appeal and case
22 appeal statement, appellant litigated a direct appeal with the assistance of counsel.
Keohokalole v. State, Docket No. 50891 (Order of Affirmance, September 18, 2008).
Therefore, the district court did not err in denying this claim.

23 Ex. 29, at 7 (#14). The Nevada Supreme Court was correct. Appellate counsel did file a fast track
24 statement. Ex. 14 (#14). The Nevada Supreme Court considered and denied his direct appeal on
25 the merits. Ex. 16 (#14). Petitioner was not denied a direct appeal. The Nevada Supreme Court
26 applied Strickland reasonably.

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1 To appeal the denial of a petition for a writ of habeas corpus, Petitioner must obtain a
 2 certificate of appealability, after making a “substantial showing of the denial of a constitutional
 3 right.” 28 U.S.C. §2253(c).

4 Where a district court has rejected the constitutional claims on the merits, the showing
 5 required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that
 6 reasonable jurists would find the district court’s assessment of the constitutional claims
 7 debatable or wrong. The issue becomes somewhat more complicated where, as here, the
 8 district court dismisses the petition based on procedural grounds. We hold as follows:
 9 When the district court denies a habeas petition on procedural grounds without reaching the
 10 prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at
 11 least, that jurists of reason would find it debatable whether the petition states a valid claim of
 12 the denial of a constitutional right and that jurists of reason would find it debatable whether
 13 the district court was correct in its procedural ruling.

14 Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074, 1077-79 (9th
 15 Cir. 2000).

16 Regarding grounds 1, 2, 4, 5, 6, and 8, the court dismissed those grounds because they were
 17 procedurally defaulted. Petitioner did not argue that cause and prejudice excused the procedural
 18 default. Reasonable jurists would not find the court’s dismissal of those grounds to be debatable or
 19 wrong, and the court will not issue a certificate of appealability for those grounds.

20 Regarding grounds 3 and 7, the Nevada Supreme Court was more than reasonable in its
 21 decisions that the claims in those grounds lacked merit. This court’s review of the record, the
 22 applicable statutes, and the case law show that petitioner’s claims lack bases in both fact and law.
 23 Reasonable jurists would not find this court’s determinations to be debatable or wrong, and the
 24 court will not issue a certificate of appealability for those grounds.

25 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (#8) is
 26 **DENIED**. The clerk of the court shall enter judgment accordingly.

27 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

28 DATED: 12/16/13



KENT J. DAWSON
 United States District Judge